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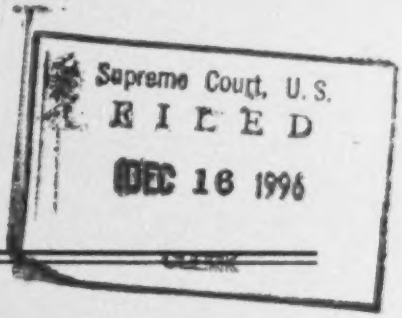

No. 96-694

IN THE

Supreme Court of the United States

OCTOBER TERM 1996

BIC CORPORATION,

Petitioner,

v.

ROBERT CARNEY and SHEILA CARNEY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For The Eighth Circuit

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REPLY FOR PETITIONER

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REPLY FOR PETITIONER

BIC Corporation's Petition for Certiorari seeks a determination by this Court whether remand orders based on lack of subject matter jurisdiction in the district court are reviewable in the court of appeals, notwithstanding 28 U.S.C. § 1447(d), where the remand turns on the decision of a federal constitutional issue. BIC demonstrates there that such an exception to the bar to appellate review has been recognized and that the decision below in this case necessarily turns on a rejection of that exception to non-reviewability. Respondents' nineteen-page opposition, for all of its convoluted argumentation, fails completely to come to grips with these fundamental contentions.

1. Respondents' principal line of argument is the assertion that the federal courts uniformly adhere to a blanket rule foreclosing appellate review in every case where remand purports to rest on a lack of subject matter jurisdiction. Opp. at 7-9. Thus, they submit, "[t]here was no need to invoke what BIC refers to as the 'constitutional issue exception' because the basis of the district court's remand order was clearly a lack of diversity and a lack of subject matter jurisdiction." *Id.* at 11.

This argument misunderstands the issue presented and amounts to a simple denial that any constitutional issue exception has been recognized in the case law or should be considered. The issue raised in *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992), the additional cases acknowledging the constitutional issue exception with approval, and in this case, is whether a remand order based on jurisdictional grounds becomes reviewable, notwithstanding 28 U.S.C. § 1447(d), where the lack of federal subject matter jurisdiction follows directly from the determination of a federal constitutional issue.

a. In *TMI*, the Third Circuit held that a remand order was reviewable on appeal where it turned on the district court's finding that the Price-Anderson Act was unconstitutional, and thus the statute's provisions giving jurisdiction to the district court were invalid. There, as here, the immediate reason for the remand was the district court's lack of subject matter jurisdiction. The remand order was found reviewable anyway, precisely

because the lack of jurisdiction followed from the resolution of a constitutional issue. Respondents thus are simply wrong in asserting that "[a]s long as a district court's remand is based on . . . lack of subject matter jurisdiction . . . a court of appeals lacks jurisdiction to entertain an appeal of the remand order . . . ." Opp. at 7.

b. Respondents' effort to distinguish *TMI*, Opp. at 12-13, does little more than reprise, by lengthy quotation and summary, the circumstances of that case, in which the district court's lack of jurisdiction resulted from its invalidation of the federal statutory scheme under which removal was authorized. Nothing in Respondents' discussion diminishes the conflict between the holding of *TMI* and the Eighth Circuit's decision in this case that the district court's remand order was not reviewable despite the fact that the district court's purported lack of jurisdiction followed from its determination that the statute at issue, Rev. Stat. Mo. § 537.762 (1987), was not unconstitutional.

Respondents argue that in *TMI* the district court had invalidated the statute in question on federal constitutional grounds, whereas here the Missouri statute was upheld and there was no "ruling of unconstitutionality." Opp. at 13. Beyond that statement, Respondents offer no explanation of why a constitutional issue exception to the rule of non-reviewability should be confined to cases where remand depends on findings of unconstitutionality. While Respondents would be free to urge such a distinction in arguing the merits of the case, no obvious reason appears why remands based on the denial of constitutional claims should be any less entitled to appellate consideration than those resulting from the affirmance of constitutional challenges. As the Third Circuit recognized in *TMI*, the important policy issue is that Congress could not have intended that district courts would be able to make federal constitutional determinations that are unreviewable (and thus potentially inconsistent), but allowing constitutional decisions to be "couched in terms of section 1447(c) and followed by a remand order" means that they "could *never* be reviewed." 940 F.2d at 845 (emphasis in original).

2. Nor do Respondents make any headway with their apparent claim that there was no resolution of a constitutional issue in either the district court or the Eighth Circuit. Opp. at 10. In the district court, Respondents' motion to remand was granted notwithstanding BIC's argument that an interpretation of the Missouri statute so as to support remand would be constitutionally invalid, because it would allow a state statute to destroy federal subject matter jurisdiction. Pet. at 8 n.3. In ordering remand, the district court thus clearly rejected BIC's constitutional argument. Pet. App. 9a.

In the Eighth Circuit, BIC again raised this constitutional argument, and specifically invoked the Supremacy Clause. Pet. at 8 n.3. The Eighth Circuit acknowledged the argument, Pet. App. 4a, but found it to be one going to "the merits" as to which it lacked jurisdiction. The court of appeals thus was explicit in its holding that it was without jurisdiction to review the remand decision, even with regard to the constitutional issue that had been raised and rejected in the district court.

3. Petitioner finds baffling Respondents' further contention that BIC is left "free to challenge the constitutionality of Mo. Rev. Stat. § 537.762 in the state court proceedings after remand." Opp. at 10. Absent grant of certiorari by this Court, the rejection of BIC's constitutional argument in the district court and the Eighth Circuit's refusal to review that ruling foreclose further consideration of the constitutional issue raised. Certainly the state court is without power to consider anew the propriety of removal in this case, and it is only in the context of removal that the constitutionality of Rev. Stat. Mo. § 537.762 (as applied by the district court) is a relevant issue.[1]

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[1] Respondents' citations to cases in which courts of appeals upheld remand orders, on the ground that the district courts lacked jurisdiction because federal law did not preempt state law (Opp. at 15-17), are thus irrelevant. The courts of appeals noted in some of those cases that the state courts were not precluded from reaching their own conclusions on preemption and applying federal law. The situation here is radically

4. Finally, the argument against certiorari is not at all enhanced by Respondents' effort to justify the Missouri statute, as applied, on the ground that it is simply an "interlocutory dismissal" provision. Opp. at 17-19. This is not the time to determine the merits of the constitutional challenge to Rev. Stat. Mo. § 537.762 beyond observing, for the reasons set forth in the Petition (at 11-12), that the contention is substantial. Respondents' effort to minimize the force of the claim by characterizing dismissals under the statute as interlocutory does not alter the fact that the district court's interpretation of the statute still allows parties to confer or deny jurisdiction to the federal court by a simple stipulation that changes not at all the identity of the parties or the substance of the claims.[2]

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different: the issue is whether the legal fictions of the Missouri statute (as construed by the district court) bar access to federal court for defendants in the position of BIC, and a state court cannot grant a party access to federal court under any circumstances. The claim that BIC can somehow raise its constitutional argument in the state court is thus wholly false.

[2] That the district court's interpretation of the Missouri statute makes it nothing more than a device for product liability plaintiffs to destroy federal diversity jurisdiction by fraudulent joinder (*i.e.*, the naming of local retailer defendants, followed quickly by stipulated dismissals) is confirmed by the fact that all of the noble statutory objectives cited by Respondents (Opp. at 19) could be achieved by a simple dismissal of the local retailer without prejudice, a dismissal that would not prevent removal based on diversity jurisdiction.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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December 16, 1996